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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case Nos.:
	)	EDCV 11-01073 VAP
Plaintiff,	)	<b>EDCR 08-00199 VAP - 2</b>
v.	)	<b>ORDER DENYING MOTION</b>
	)	<b>PURSUANT TO 28 U.S.C. § 2255</b>
ADAN ROSALES GONZAGA,	)	<b>[Motion filed on July 13,</b>
Defendant.	)	<b>2011]</b>

**I. SUMMARY OF PROCEEDINGS**

On July 13, 2011, Defendant Adan Rosales Gonzaga filed a "Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, 28 U.S.C. § 2255." ("Mot."). (Doc. No. 112.)<sup>1</sup> On January 9, 2012, the Court modified the briefing schedule for Defendant's Motion, permitting the Government to file its Opposition by January 13, 2012, and Defendant to file his Reply by

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<sup>1</sup> Many of the documents filed in support appear on both the civil docket for this case, ED CV 11-01073 VAP, and on the docket for the underlying criminal case, United States v. Gonzaga, et al., ED CR 08-00199 VAP - 2. Unless otherwise noted, all citations to docket numbers refer to the criminal case docket.

1 February 24, 2012. On January 13, 2012, the Government  
2 filed its Opposition to the Motion ("Opp'n"), accompanied  
3 by the Declaration of Antoine F. Raphael and attached  
4 exhibits. Defendant did not file a Reply.

5  
6 **II. BACKGROUND**

7 On October 8, 2008, a federal grand jury in this  
8 district returned a seven-count indictment charging  
9 Defendant with:

- 10 (1) conspiracy to possess narcotics with intent to  
11 distribute, in violation of 21 U.S.C. § 846;  
12 (2) manufacturing 1,000 or more marijuana plants, in  
13 violation of 21 U.S.C. §§ 841(a)(1) and  
14 841(b)(1)(A); 18 U.S.C. § 2(a);  
15 (3) manufacturing 1,000 or more marijuana plants, in  
16 violation of 21 U.S.C. §§ 841(a)(1) and  
17 841(b)(1)(A); 18 U.S.C. § 2(a);  
18 (4) intentionally possessing with intent to  
19 distribute a mixture and substance containing a  
20 detectable amount of marijuana, in violation of  
21 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); 18  
22 U.S.C. § 2(a);  
23 (5) intentionally possessing with intent to  
24 distribute a mixture and substance containing a  
25 detectable amount of marijuana, in violation of  
26 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); 18  
27 U.S.C. § 2(a);  
28

1 (6) possessing a firearm during and in relation to  
2 and in furtherance of a drug trafficking crime,  
3 in violation of 18 U.S.C. §§ 924(c)(1)(A) and  
4 (2)(a); and

5 (7) possessing multiple firearms during and in  
6 relation to and in furtherance of a drug  
7 trafficking crime, in violation of 18 U.S.C.  
8 §§ 924(c)(1)(A) and (2)(a).

9 (Indictment (Doc. No. 11).) On February 2, 2010,  
10 Defendant signed a plea agreement with the Government,  
11 agreeing to plead guilty to Counts One and Six of the  
12 Indictment. (Plea Agreement (Doc. No. 55 ¶ 2).) On  
13 February 16, 2010, the Court, the Honorable Richard A.  
14 Paez, Circuit Judge (sitting by designation) presiding,  
15 held a change-of-plea hearing for Defendant wherein  
16 Defendant changed his plea from "not guilty" to "guilty"  
17 for Counts One and Six. (See Min. of Change of Plea  
18 Hr'g. (Doc. No. 59).)

19  
20 On July 20, 2010, the Court sentenced Defendant to  
21 120 months incarceration on Count One, and 60 months on  
22 Count Six, to be served consecutively. (J. & Commitment  
23 Order (Doc. No. 94).)

24  
25 Defendant filed his notice of appeal on August 3,  
26 2010 (Doc. No. 97), and the Ninth Circuit affirmed his  
27 sentence on November 8, 2011. See United States v.  
28

1 Gonzaga, No. 10-50369, 2011 WL 5357535 (9th Cir. Nov. 8,  
2 2011).

### 3 4 **III. LEGAL STANDARD**

5 Section 2255 authorizes the Court to "vacate, set  
6 aside or correct" a sentence of a federal prisoner that  
7 "was imposed in violation of the Constitution or laws of  
8 the United States." 28 U.S.C. § 2255(a). Claims for  
9 relief under § 2255 must be based on some constitutional  
10 error, jurisdictional defect, or an error resulting in a  
11 "complete miscarriage of justice," or in a proceeding  
12 "inconsistent with the rudimentary demands of fair  
13 procedure." United States v. Timmreck, 441 U.S. 780,  
14 783-84 (1979). If the record indicates clearly that a  
15 petitioner does not have a claim or that he has asserted  
16 "no more than conclusory allegations, unsupported by  
17 facts and refuted by the record," a district court may  
18 deny a § 2255 motion without an evidentiary hearing.  
19 United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986);  
20 see also United States v. Chacon-Palomares, 208 F.3d  
21 1157, 1159 (9th Cir. 2000) ("When a prisoner files a  
22 § 2255 motion, the district court must grant an  
23 evidentiary hearing 'unless the motion and the files and  
24 records of the case conclusively show that the prisoner  
25 is entitled to no relief.'" (quoting 28 U.S.C. § 2255)).

### III. DISCUSSION

In his Motion, Defendant raises two grounds he contends entitle him to relief. First, he argues he "did not 'use' or 'carry' a firearm within the meaning of [§] 924(c)(1), because he did not 'actively employ' a firearm as defined in [United States] v. Bailey, 516 U.S. 137 (1995)." (Mot. at 5.) Second, Defendant contends he was "unlawfully induced" to change his plea from "not guilty" to "guilty." (Mot. at 7.)

#### A. Defendant's First Ground for Relief

Relying on United States v. Bailey, Defendant contends he did not "actively employ" a firearm, and thus did not "use" or "carry" a firearm within the meaning of 18 U.S.C. § 924(c)(1)(A), which requires a minimum consecutive sentence of five years imprisonment for anyone who "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm." Defendant's argument fails for several reasons.

First, "[h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal." Bousley v. United States, 523 U.S. 614, 621 (1998). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that

1 he is actually innocent." Id. at 622 (internal citations  
2 omitted). A defendant can demonstrate "cause" by showing  
3 "that some objective factor external to the defense  
4 impeded his adherence to the procedural rule." United  
5 States v. Skurdal, 341 F.3d 921, 925 (9th Cir. 2003)  
6 (citation and internal quotation omitted).

7  
8 Here, a review of Defendant's opening brief filed  
9 with the Ninth Circuit for his direct appeal reveals that  
10 he did not raise this issue on appeal. (See Gonzaga, No.  
11 10-50369, Opening Br. (Doc. No. 16) at 2.) Hence, as  
12 Defendant did not raise this issue in his direct appeal,  
13 he has procedurally defaulted this claim. Bousley, 523  
14 U.S. at 621; Skurdal, 341 F.3d at 925 ("If a criminal  
15 defendant could have raised a claim of error on direct  
16 appeal but nonetheless failed to do so, he must  
17 demonstrate both cause excusing his procedural default,  
18 and actual prejudice resulting from the claim of error."  
19 (quoting United States v. Johnson, 998 F.2d 941, 945 (9th  
20 Cir. 1993))). Moreover, as Defendant has offered no  
21 evidence demonstrating "cause," "prejudice," or that he  
22 is "actually innocent," he is procedurally barred from  
23 maintaining his first claim.

24  
25 Second, even assuming Defendant did not procedurally  
26 default on his first claim, the claim fails on the  
27 merits, as the case he relies upon, United States v.  
28

1 Bailey, is no longer good law. In Bailey, the Court held  
2 that "mere possession" of a firearm was insufficient to  
3 trigger the penalty provision in § 924(c)(1), and  
4 reasoned that "use" of a firearm as specified in  
5 § 924(c)(1) "must connote more than mere possession of a  
6 firearm by a person who commits a drug offense." 516  
7 U.S. at 143. The Court therefore "h[e]ld that §  
8 924(c)(1) requires evidence sufficient to show an active  
9 employment of the firearm by the defendant, a use that  
10 makes the firearm an operative factor in relation to the  
11 predicate offense." Id.

12  
13 In 1998, three years after the Court decided Bailey,  
14 Congress "added the word 'possesses' to the principal  
15 paragraph" of § 924(c), in an "amendment [that] was  
16 colloquially known as the 'Bailey Fix Act.'" United  
17 States v. O'Brien, 560 U.S. \_\_\_, 130 S. Ct. 2169, 2179  
18 (2010) (citing 144 Cong. Rec. 26608 (1998) (remarks of  
19 Sen. DeWine)). Hence, by amending § 924(c), "the  
20 Legislature brought possession within the statute's  
21 compass." Abbott v. United States, 560 U.S. \_\_\_, 131 S.  
22 Ct. 18, 25 (2010) (citing O'Brien, 130 S. Ct. at 2179).

23  
24 Here, Defendant committed the crimes charged in 2008,  
25 after § 924(c) was amended. Moreover, in Defendant's  
26 Plea Agreement, he admitted that he:

1 possessed at the Cultivation Site the following  
2 item[] used in furtherance of [his] agreement to  
3 manufacture and possess with intent to distribute  
4 marijuana plants and marijuana: . . . (3) a  
Norinco SKS 7.62 x 39 rifle, Serial No. 22045280,  
modified pistol grip with stock removed.

5 (Plea Agreement at 7-8.) Thus, as the amended version of  
6 § 924(c) applied when Defendant committed the crimes, and  
7 Defendant admitted that he "possessed" the firearm in his  
8 Plea Agreement, the Government did not need to  
9 demonstrate Defendant "actively employed" the firearm for  
10 § 924(c) to apply; possession alone was sufficient.  
11 Accordingly, Defendant's reliance on Bailey is misplaced  
12 and his sentence for violating § 924(c) was proper.

13 The Court therefore DENIES Defendant's Motion as to  
14 his first ground for relief.

15  
16 **B. Defendant's Second Ground for Relief**

17 Defendant next contends he was "unlawfully induced"  
18 by unspecified threats of force or fear to enter a guilty  
19 plea. (Mot. at 7.) This argument also fails.

20  
21 It is well established that criminal defendants are  
22 "barred from using a § 2255 motion to relitigate issues  
23 decided on direct appeal." United States v. Ramirez, 327  
24 F. App'x 751, 752 (9th Cir. 2009) (citing United States  
25 v. Redd, 759 F.2d 699, 701 (9th Cir. 1985)); see also Sun  
26 Bear v. United States, 644 F.3d 700, 702 (8th Cir. 2011)  
27 ("With rare exceptions, § 2255 may not be used to  
28



1 relitigate matters decided on direct appeal." (citing  
2 Davis v. United States, 417 U.S. 333, 346-47 (1974));  
3 Yick Man Mui v. United States, 614 F.3d 50, 55 (2d Cir.  
4 2010) ("[A] Section 2255 petitioner may not 'relitigate  
5 questions which were raised and considered on direct  
6 appeal.'" (quoting United States v. Becker, 502 F.3d 122,  
7 127 (2d Cir. 2007)); United States v. Linder, 552 F.3d  
8 391, 396-97 (4th Cir. 2009) (holding a defendant "may not  
9 circumvent a proper ruling on his Booker challenge on  
10 direct appeal by re-raising the same challenge in a §  
11 2255 motion."); United States v. Sanin, 252 F.3d 79, 83  
12 (2d Cir. 2001) ("It is well established that a § 2255  
13 petition cannot be used to relitigate questions which  
14 were raised and considered on direct appeal." (internal  
15 quotation marks omitted)); DuPont v. United States, 76  
16 F.3d 108, 110 (6th Cir. 1996) (same).

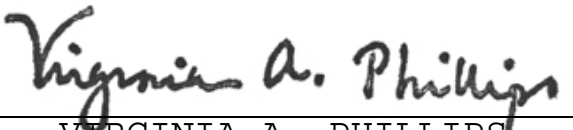
17  
18 Here, Defendant raised in his direct appeal the  
19 argument he advances now; i.e., that he was "unlawfully  
20 induced" through threats of force or fear to enter a  
21 guilty plea, and the district court failed to inquire  
22 about the voluntariness of his plea. (See Gonzaga, No.  
23 10-50369, Opening Br. (Doc. No. 16) at 11, 12, 16, 17;  
24 see also Mot. at 8 ("This issue is raised in an appeal  
25 from sentence [sic] now pending in the [Ninth  
26 Circuit].").) In response, the Ninth Circuit affirmed  
27 the guilty plea and sentence, holding that "[a]llthough  
28

1 the district court erred in its plea colloquy" by not  
2 inquiring whether Defendant's "guilty plea was the result  
3 of force or threats," Defendant nevertheless "failed to  
4 establish a reasonable probability that, but for the  
5 error, he would not have entered the plea." Gonzaga,  
6 2011 WL 5357535, at \*1. Accordingly, as Defendant  
7 raised, and the Ninth Circuit rejected, this argument on  
8 appeal, he cannot raise the argument in his § 2255  
9 Motion. Ramirez, 327 F. App'x at 752; Redd, 759 F.2d at  
10 701.

11  
12 The Court therefore DENIES Defendant's Motion as to  
13 the second ground for relief.

14  
15 As both of Defendant's grounds for relief fail, the  
16 Court DENIES Defendant's § 2255 Motion WITH PREJUDICE.

17  
18 Dated: May 24, 2012

  
\_\_\_\_\_  
VIRGINIA A. PHILLIPS  
United States District Judge